

MARY E. VICKERS)
(Widow of GLEN VICKERS))

Claimant-Respondent)

v.)

SERVICE EMPLOYEES)
INTERNATIONAL, INCORPORATED)

DATE ISSUED: 02/26/2013

and)

INSURANCE COMPANY OF THE STATE)
OF PENNSYLVANIA)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Respondent)

DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Dennis L. Brown and Mike N. Cokins (Dennis L. Brown, P.C.), Houston, Texas, for claimant.

Jerry R. McKenney and Karen A. Conticello (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2011-LDA-00507) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On August 14, 2004, decedent sustained injuries to his arm while working as a logistics coordinator for employer in Iraq. Decedent returned to the United States for reconstructive surgery and then returned to Iraq on January 1, 2005. Decedent testified that he worked for the next five or six months in excruciating pain and that he was prescribed opium for the pain. In April or May 2005, decedent suffered a gastrointestinal illness that lasted for four or five days. Decedent returned to the United States on recreational leave, and in the latter part of August 2005, sought treatment for his continued arm problems. After undergoing a carpal tunnel release, decedent was referred to Dr. Vaughn, a neurophysiologist, who diagnosed his condition as chronic idiopathic degenerative polyneuropathy (CIDP). Decedent, who did not return to his employment with employer, sought permanent total disability benefits under the Act.

In his Decision and Order adjudicating decedent's claim for disability benefits, the administrative law judge found that decedent was entitled to the benefit of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), that his CIDP is related to his employment with employer. The administrative law judge found that while employer produced evidence sufficient to rebut the presumption that decedent's arm injury did not cause his polyneuropathy, it did not rebut the presumed relationship between decedent's gastrointestinal illness and surgeries and his CIDP. Finding that decedent could not perform his regular duties as of August 9, 2005, as a result of his orthopedic and CIDP conditions, and that decedent had not reached maximum medical improvement, the administrative law judge awarded decedent ongoing temporary total disability benefits commencing August 9, 2005. 33 U.S.C. §908(b).

Employer appealed this decision. The Board affirmed the administrative law judge's finding that decedent invoked the Section 20(a) presumption that his neuropathy and CIDP are related, at least in part, to his work-related injury on August 14, 2004, his subsequent related surgeries, and the gastrointestinal illness decedent suffered while in Iraq. The Board further affirmed the administrative law judge's finding that employer did not introduce substantial evidence that decedent's CIDP was not related, at least in part, to his work-related surgery or to the gastrointestinal illness decedent contracted while employed in Iraq, and that consequently decedent's CIDP is compensable under the Act. The Board also affirmed the administrative law judge's award of total disability benefits. *G.V. [Vickers] v. Kellogg, Brown & Root/Service Employers Int'l, Inc.*, BRB No. 08-0322 (Sept. 29, 2008)(unpub.).

Employer sought reconsideration, arguing that the intervening decision of the United States Court of Appeals for the Fifth Circuit in *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008) required reversal of the award of benefits. The Board denied employer's motion, holding that as decedent made a claim under the Act for benefits for the sequelae of his arm injury, specifically for injuries to "other parts of body, other related problems associated with injury and working conditions in Iraq," decedent's claim was distinguishable from that presented in *Amerada Hess*. *G.V. [Vickers] v. Kellogg, Brown & Root/Service Employers Int'l, Inc.*, BRB No. 08-0322 (May 20, 2009) (Order on Motion for Recon.)(unpub.). The Board's decision was affirmed by the United States District Court for the Southern District of Texas. *Ins. Co. of the State of Pennsylvania v. Director, OWCP*, No. 4:09-CV-01998 (S.D. Tex. Feb. 12, 2012). Employer appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit.

On August 9, 2010, decedent passed away. Claimant, decedent's widow, subsequently filed a claim for death benefits under the Act averring that decedent's work-related conditions hastened his death. 33 U.S.C. §909.

In his Decision and Order addressing claimant's claim for death benefits, the administrative law judge found claimant entitled to invocation of the Section 20(a) presumption that decedent's death was causally related to his employment as claimant established that decedent's polyneuropathy was a natural and unavoidable result of his employment with employer in Iraq, and that this condition could have accelerated or hastened decedent's death. The administrative law judge found, however, that employer rebutted the presumption. The administrative law judge then weighed the evidence as a whole and concluded that claimant established a causal relationship between decedent's death and his employment. The administrative law judge denied employer's request for relief pursuant to Section 8(f), 33 U.S.C. §908(f), and he awarded claimant death benefits and funeral expenses. 33 U.S.C. §909(a), (b).

Employer appeals the administrative law judge's finding that decedent's death was causally related to his employment, contending that the administrative law judge erred in finding that decedent's underlying neuropathy and gastrointestinal illness were related to his employment with employer in Iraq, and thus that decedent's death was work-related. Employer also asserts that if a causal relationship exists between decedent's death and his employment with employer, the administrative law judge erred in failing to award it relief pursuant to Section 8(f) of the Act. Claimant responds, urging affirmance of the administrative law judge's award of death benefits. The Director, Office of Workers' Compensation Programs, has also responded, averring that the administrative law judge properly denied employer's request for Section 8(f) relief.

Recently, the United States Court of Appeals for the Fifth Circuit issued its decision on the disability claim in *Ins. Co. of the State of Pennsylvania v. Director, OWCP [Vickers]*, No. 12-20228 (5th Cir. Feb. 15, 2013)(unpub.), wherein the court reversed the Board's decision affirming the administrative law judge's award of disability benefits to the decedent. Specifically, the court applied *Amerada Hess* and held that decedent's claim for disability benefits arising as a result of "other . . . problems associated with [his arm] injury and working conditions in Iraq" was a vague declaration insufficient to constitute a claim to which the Section 20(a) presumption applies. *Vickers*, slip op. at 7-9; see *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). As decedent did not assert a primary claim for CIDP, the court concluded that it was error to apply the Section 20(a) presumption to that condition. Rather, as CIDP is properly understood to be a secondary injury because it allegedly arose as a result of decedent's work-related surgeries and the gastritis decedent allegedly contracted due to working conditions in Iraq, the Fifth Circuit held that the administrative law judge should have addressed whether it "naturally or unavoidably" arose from the compensable arm injury, an issue on which the decedent bore the burden of persuasion without the benefit of the Section 20(a) presumption. *Id.* at 9-11; see 33 U.S.C. §902(2). Accordingly, as the administrative law judge improperly applied the Section 20(a) presumption to decedent's CIDP, the court vacated the award and remanded the case to the administrative law judge for a determination of whether substantial evidence establishes that decedent's CIDP naturally or unavoidably resulted from decedent's work-related arm injury. *Id.* at 11.

In his decision on the claim for death benefits, the administrative law judge acknowledged that the Board and the district court had affirmed his prior findings. The administrative law judge applied the Section 20(a) presumption to both the issue of whether decedent's CIDP was a sequela of his work-related arm injury and whether the

death was related to those conditions.¹ Decision and Order at 23-26. In light of the Fifth Circuit’s decision in *Vickers* holding that the Section 20(a) presumption is inapplicable to decedent’s CIDP, the administrative law judge’s application of Section 20(a) to decedent’s CIDP and death cannot be affirmed. We therefore vacate the administrative law judge’s finding that decedent’s polyneuropathy is work-related, and his consequent award of death benefits based on his finding that this condition hastened death, and we remand the case for further consideration consistent with *Vickers*.

Accordingly, the administrative law judge’s Decision and Order awarding death benefits is vacated, and the case is remanded for further findings consistent with the Fifth Circuit’s decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

¹The administrative law judge appears to have addressed the evidence under the “natural or unavoidable” result standard, but concluded from this evidence that claimant is afforded the benefit of the Section 20(a) presumption. Decision and Order at 23-26. Thus, we must vacate his finding.